REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER 69 OF 2020

DANIEL WAMBUA KISILU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original order in Machakos (Wamunyu) Sexual Offence Case No. 15 of 2020 (Hon. Nyoike, PM on 7th July, 2020)

BETWEEN

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

-VERSUS-

DANIEL WAMBUA KISILU.....1ST ACCUSED

VERONICAH MBINYA MUSAU.....2ND ACCUSED

RULING ON REVISION

1. The applicant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the ***Sexual Offences Act***, No. 3 of 2006 the particulars being that the applicant on the 26th day of June, 2020 in Mwala Subcounty within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of LMM, a child aged 16 years old.

2. From the proceedings, when the applicant was arraigned in court on 7th July, 2020, he pleaded not guilty. However, for some reason, the record does not indicate that a plea was recorded. In the case of **Adan vs Republic (1973) EA 445**, the steps to be undertaken in recording a guilty plea were stated as follows:

> **"When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded."**

3. While section 208 of the Criminal Procedure Code does not provide for this, it is my view that the guidelines set out in the above case ought to be followed as much as possible. However, in the circumstances of the case under review the failure to do so was not fatal.

4. What followed after the applicant pleaded to the charge was that the prosecution opposed the release of the applicant on bail on the ground that the applicant faced another criminal case being Machakos Case No. 276 of 2018 in which he was charged with the offence of causing grieveous harm and was admitted to bail. He however breached the conditions set therein by committing another offence. It was also contended that there was a likelihood of him interferering with witnesses since he was the Assistant Chief for Mithanga Location from where

the victim hailed. It was further contend that the applicant hailed from a hostile environment hence there was a threat to his life from the community members in view of the charges facing him. The Court was therefore urged to deny him bail for his own safety.

5. Based on the foregoing it was the prosecution's view that there were compelling reasons to deny the applicant bond. The said position was based on an affidavit sworn by **Cpl Anthony Musembi**.

6. The applicant, through his counsel was howeber of eh view that the existence of another case is not a valid ground for denial of bail and that there was no evidence of interrence with witnesses or that the environment was hostile to him.

7. In her ruling the learned trual magistrate found that the applicant faced profound charges that carry a sentence of not less than 15 years and was a person holding a high office of an Assistant Chief whose knowledge, contac and interaction with the residents in his area of jurisdiction cannot be gainsaid. She also took note of the allegations that the applicant was facing other charges of serious nature and that there was reasonable apprehension that he might interfere with the case/witnesses notwithstanding the fact that investigations had been concluded. These coupled with the need to ensure the accused's safety, security and protection, according to the learned trial magistrate, provided compelling reasons as to why the applicant should be denied bond/bail. She accordingly, acceded to the application by the Prosecution.

8. The applicant has moved this court vide an application dated 8th July, 2020 seeking the following orders:

> **1. THAT that this Honourable court do call for and examine the record in Criminal Case No. 15 of 2020 Republic versus Daniel Wambua Kisilu & Another for purpose of satisfying itself as to the correctness and legality of the ruling of the Principal Magistrate Court on 7th July 2020.**
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> **2. THAT the Honourable Court do revise the order of 7th July 2020 in Criminal Case No. 15 of 2020 denying the applicant Bail/Bond and do order that the applicant be admitted on Bail/Bond with an alternative of cash on such reasonable terms pending his trial.**

9. It is the applicant's case that the prosecution has not placed before the court any documents or any other matrial facts demonsytrating the existence of compelling reasons to warrant his denial to being admitted to bail/bond. According to him the affidavit sworn by Cpl Musembi was based on mere apprehension and speculations and ought not to have been relied on. According to him, while he hails from Mithanga Sub Location, the prosecution witnesses hail from Vyula Location. It was his view that since the investigations have been concluded the perceived threats to witnesses has not been proved.

10. In the replying affidavit the Respondent insisted that the prosecution adduced compelling reasons why bail should be denied and that the court took into account the circumstances of the case in denying him bail hence the application does not meet the legal requisite for the grant of the orders sought.

Determination

11. I have considered the material before, the submissions as well as the authorities cited and this is the view I form of the matter.

12. Section 362 of the ***Criminal Procedure Code*** provides as follows:

> **The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**

13. "Any criminal proceedings" in my view includes interlocutory proceedings. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine ***the regularity of any proceedings of any such subordinate court*** as well.

14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, held that:

> **"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under *section 84 (7)* of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007**

to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."

15. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

16. On the merits, in order to fully appreciate the matter before the Court it is important to regurgitate the principles that guide the grant of bail pending trial.

17. Article 49(1)(h) of the Constitution provides that:-

An accused person has the right …

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

18. The Constitution however has not identified what qualifies under the term "compelling reasons." The ordinary meaning according to ***Thesaurus English Dictionary*** of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

19. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release. In **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**, the Court held that:

"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system… the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question… the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may

face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

> **"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."**

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

20. Gravity of the offence as a consideration was appreciated however by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

> **"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."**

21. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

> **"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-**
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> **(i) The nature of the charges;**
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> **(ii) The strength of the evidence which supports the charge;**
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> **(iii) The gravity of the punishment in the event of conviction;**
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> **(iv) The previous criminal record of the accused if any;**
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> **(v) The probability that the accused may not surrender himself for trial;**
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> **(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
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> **(vii) The likelihood of further charges being brought against the accused;**
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> **(viii) The probability of guilty;**
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> **(ix) Detention for the protection of the accused;**
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> **(x) The necessity to procure medical or social report pending final disposal of the case.**

22. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> **"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."**

23. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

> **(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—**

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.

24. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

> **"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."**

25. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

26. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

> **"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."**

27. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden

to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in **Republic vs. William Mwangi Wa Mwangi [2014] eKLR** where **Muriithi, J** held that:

> **"It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail…It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail."**

28. In **Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120** it was held by the Constitutional Court of Uganda that:

> **"The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially…]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person's appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him."**

29. As regards the same issue, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** expressed himself as hereunder:

> **"Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;**
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> **'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'**
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> **Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."**

30. In this case the learned trial magistrate's decision to deny the applicant bail was three-fold. First, it was contended that the applicant had been charged with another criminal offence in which he breached the terms of his release on bail by committing the instant offence. While the commission of another offence while one is out on bond may, depending on the nature of the offence committed, be taken into account in determining whether to release the accused on bond in a subsequent case or not, it is my view that it does not necessarily follow that that must always be the position. The nature of the offence committed must be considered. For example, a person facing a murder charge cannot be denied bail simply because while out on bail he committed a minor traffic offence. Secondly, the mere fact that a person who is out on bond is charged with commission of an offence which he denies cannot amount to a commission of an offence while out on bond since the accused must always be treated as innocent until found guilty. In this case the applicant is yet to be found guilty of the instant offence. Therefore, the subject case cannot be a basis of a finding that the applicant committed an offence contrary to the conditions for his release on bond.

31. The second objection was that being a chief of the area he is likely to influence the witnesses and the manner in which the case will be prosecuted. It is not in doubt that a Chief or an Assistant Chief wields a lot of influence in the community where he is based. However, in this case there is as yet no evidence that the applicant has attempted to interfere though that is a possibility. In my view each case must be considered on its own facts since it would be unconstitutional to hold that those holding administrative positions in society are not entitled to be admitted to bail. In addition, the fact that an accused person is facing criminal proceedings does not bar further charges being preferred against him since obstructing a cause of justice itself is a criminal offence. It is the duty of the State to ensure that all persons enjoy their fundamental rights and this applies to both the victims and the accused persons. I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & Others High Court Criminal Case No. 61 of 2012** that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat**

or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."

32. Therefore, the Court in making a determination must consider whether there are safeguards which, if invoked, are capable of impacting of the safety of the witnesses including barring the accused from stepping in the jurisdiction where the witnesses are as was held in **Republic vs. Zacharia Okoth Obado & 2 Others [2018] eKLR**. In that case the Learned Trial Judge found that:

"On the whole question of the likelihood of interference with the case witnesses and intimidation this cannot be taken lightly. The Accused persons have been supplied with the witness statements and have the names and contacts of those who have adversely mentioned them in connection with the case. The manner in which the deceased met her death is in the public domain and the evidence has also been provided. I find that given the circumstances of this case the likelihood of the adversely mentioned Accused persons contacting the witnesses can inflict genuine fear and anxiety to them. I think that the mere release of the Accused is sufficient to inflict anxiety and fear leading to intimidation of potential witnesses."

33. Notwithstanding that finding the Learned Trial Judge proceeded to grant the 1st Accused bail on the following terms:

1. The 1st Accused may be released upon deposit into court of cash bail in the sum of Kshs. 5 million.

2. In addition the 1st Accused will provide two sureties of Kshs. 5 million each.

3. The 1st Accused must deposit all his travel documents including his Kenyan, East African and Diplomatic passports which he holds.

4. The court will be at liberty to cancel this bail and bond and to remand the 1st Accused in custody if any of the following conditions, which I hereby set as part of the terms upon which he is released, are breached:

i. He shall not cause an adjournment in this case.

ii. He shall report once a month to the Deputy Registrar of this court.

iii. He shall not go anywhere within 20 kilometers of Homabay County boundary on all sides of that County.

iv. He shall not contact or intimidate, whether directly or by proxy any of the witnesses in this case as per the Witness Statements and other documents supplied by the State to the defence.

v. He shall not intimidate the parents, siblings or other close relations of the deceased.

vi. He shall refrain from mentioning or discussing the deceased and or this case in gatherings or political meetings.

34. What comes out from the said decision is that there are in place constitutional and legislative mechanisms in place to protect witnesses who are shown to be under real threat if an accused person is released.

35. However, where compelling reasons are given nothing bars the court from denying the release of the accused on bail for a definite period. In other words, the trial court may find from the material placed before it that at that stage it would not be just to release the accused on bail and that the application may be renewed at a later stage when the circumstances have changed, for example where vulnerable witnesses have testified. In this case the learned trial magistrate seemed to have determined the issue of release on bail of the applicant with finality since she did not give any room for future review of the situation once the apprehensions of the prosecution were dealt with. In other words, the Court ought to make a specific finding as to whether or not it is satisfied that compelling reasons exist that militate against the admission of the accused to bail at any particular stage of the proceedings. In my view where the Court declines to admit the accused on bond pending the testimony of some witnesses or the occurrence of certain events the said witnesses' testimonies ought to be taken as soon as possible and the event in question ought to be accelerated as fast as possible in order not to unduly limit the accused person's constitutional rights.

36. The third ground was that it was in the interest of the safety of the applicant that he be kept in custody due to the hostility on the ground. While I agree that the safety of an accused person may well constitute compelling reasons for denial of bail, it is my view that for such a ground to constitute compelling reasons satisfactory material must be placed before the court. I therefore agree with the position adopted by **Ouko, J** (as he then was) in **Nicholas Kipsigei Ngétich & 2 Others vs. Republic [2011] eKLR** that:

"…it is the duty of the State in terms of Article 29(c) and 238 of the Constitution to ensure the security and safety of the applicants, a duty which the State cannot run away or abdicate. It cannot be in the mouth of a State official charged with this duty to imply that Kenyans will only be safe in prisons. Thirdly from the statements annexed to the replying affidavit, it is not in doubt that some of the witnesses have been threatened. However, the police have not linked the applicants with those threats. The police have the means and technical know-how to be able to trace the source of the threats."

37. Section 367 of the ***Criminal Procedure Code***, provides as hereunder:

> **When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.**

38. In order to balance the interests of the applicant and that of the complainant, I hereby direct that the taking of the evidence of the complainant and any other vulnerable witnesses be accelerated and thereafter the applicant be admitted to bail on.

39. Accordingly, I direct **Machakos (Wamunyu) Sexual Offence Case No. 15 of 2020** be mentioned before the trial court on 25th August, 2020

40. With a view to fixing a hearing date on priority basis for the vulnerable witnesses. However, if the circumstances have changed nothing bars the trial court in the exercise of its discretion from admitting the applicant on bail pending trial even before then.

41. It is so ordered.

Read, signed and delivered in open Court at Machakos this 18th day of August, 2020.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamanda for the applicant

Mr Ngetich for the Respondent

CA Geoffrey